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State v. Hansen Appellant's Brief Dckt. 40647

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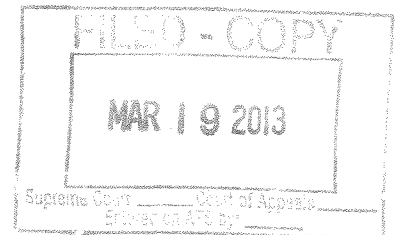
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 40647
Plaintiff-Respondent,)	
)	TWIN FALLS COUNTY NO. CR 2010-8255
v.)	
)	
ROBERT CASSIDY HANSEN,)	APPELLANT'S BRIEF
)	ON REVIEW
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE



Nature of the Case

Robert Hansen pleaded guilty to aggravated driving under the influence and leaving the scene of an injury accident. At the sentencing hearing, Mr. Hansen objected to the presentation of a victim impact statement from the father of the adult victim of Mr. Hansen's offense. However, the district court overruled this objection and permitted the victim's father to make a victim impact statement for the court's consideration at sentencing. The district court sentenced Mr. Hansen to 15 years, with three years fixed,

upon his guilty plea to aggravated driving under the influence; and to five years, with three years fixed, upon his plea to leaving the scene of an injury accident.

Mr. Hansen timely appealed from his judgment of conviction and sentence and asserted that the district court erred when it allowed the father of the alleged victim of his offense to provide a victim impact statement, as the father did not qualify as a "victim" under the definitions provided in I.C. § 19-5306. In addition, Mr. Hansen asserted that the district court imposed excessive sentences, and thereby abused its discretion.

The Idaho Court of Appeals agreed that the alleged victim's father did not qualify as a victim for purposes of I.C. § 19-5306, but ultimately found that the error in admitting the father's remarks as such was harmless. The Court of Appeals further held that there was no abuse of discretion at sentencing. Accordingly, the Idaho Court of Appeals affirmed Mr. Hansen's judgment of conviction and sentence.

This Court granted review of all issues on appeal upon the State's petition for review.

Statement of the Facts & Course of Proceedings

Robert Hansen was charged with aggravated driving under the influence and leaving the scene of an injury accident. (R, pp.61-62.) He entered into a plea agreement in which he agreed to plead guilty to both charges. (Tr., p.4, L.7 – p.16, L.19; R., pp.102-111.) Within the written change of plea form, Mr. Hansen indicated that he was waiving his right to appeal his sentence if the district court imposed a sentence that, "exceeds three years fixed." (R., p.104.) In the amended written plea agreement, the following term of the plea agreement was set forth by the parties:

By accepting this offer the defendant waives the right to: (1) file a Rule 35 Motion (except as to an illegal sentence) and (2) appeal any issues in this case, including all matters involving the plea or the sentencing and any rulings made by the court, including all suppression issues. However, the defendant may appeal the sentence if the Court exceeds the determinate portion of the State's sentencing recommendation of the "Jail/Prison terms" set forth above.

(R., p.111.)

At Mr. Hansen's sentencing, he pleaded guilty to a new charge of domestic violence.¹ (Tr., p.20, L.7 – p.28, L.18.) The State presented a victim impact statement from the adult victim of Mr. Hansen's offense of leaving the scene of an injury accident. (Tr., p.34, L.10 – p.36, L.3.) However, the district court also permitted the State, over Mr. Hansen's objection, to present a victim impact statement from the adult victim's father. (Tr., p.36, Ls.5-22.) Mr. Hansen objected to the presentation of this statement due to the fact that the alleged victim's father did not qualify as a "victim" for purposes of presentation of a victim impact statement at sentencing. (Tr., p.36, Ls.5-10.)

Following the presentation of the victim impact statements, and other evidence and argument from the parties, the district court sentenced Mr. Hansen to 15 years, with three years fixed, upon his plea to aggravated driving under the influence and to five years, with three years fixed, for leaving the scene of an injury accident. (Tr., p.66, Ls.8-17.) The district court's sentence exceeded the determinate term recommended by the State in the underlying plea agreement with regard to the sentence for leaving the scene of an injury accident. (Tr., p.66, Ls.11-13; R., pp.111, 145.)

¹ Mr. Hansen's conviction and sentence for domestic violence is not at issue in this appeal. See Idaho Supreme Court Order Granting Motion to Sever Consolidated Appeals and Dismiss Case No. 39062-2011.

Thereafter, Mr. Hansen filed an Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion seeking a reduction of his sentence. (R., pp.149-151.) Within this motion, Mr. Hansen informed the district court that, "The state has been contacted and is not asserting the plea agreement prohibits the filing of a Rule 35 in these cases." (R., p.149.) However, Mr. Hansen did not present new or additional information to the district court in conjunction with this motion with regard to his sentences for driving under the influence or leaving the scene of an injury accident, but instead asked for reconsideration of these sentences in light of letters and other materials already presented at the sentencing hearing.² (R., pp.149-150.)

The district court denied this motion without a hearing. (R., pp.158-161.) Mr. Hansen timely appealed from the district court's judgment of conviction and sentence.³

The Idaho Court of Appeals ultimately held that the appeal waiver contained in Mr. Hansen's plea agreement barred his challenges as to his sentence for aggravated driving under the influence, but not for his sentence for leaving the scene of an injury

² Given that Mr. Hansen did not present new and additional information in conjunction with his request for leniency in the sentences at issue in this appeal, he does not herein assert an abuse of discretion for the district court's denial of this motion. See *State v. Huffman*, 144 Idaho 201, 203 (2007) (defendant must present new and additional information in conjunction with request for leniency under Rule 35 and, in absence of presentation of such information, an appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence).

³ The judgment of conviction in Mr. Hansen's case was entered on May 23, 2011. (R., p.141.) However, he filed his Rule 35 motion within 11 days of the entry of judgment of conviction. (R., pp.141, 149.) Under the provisions of I.A.R. 14(a), the filing of a Rule 35 motion within 14 days of the entry of the judgment of conviction tolls the time to file a notice of appeal, which commences to run upon the court's decision on the motion. See I.A.R. 14(a). The district court decided Mr. Hansen's Rule 35 motion on July 18, 2011. (R., p.158.) Therefore, his filing of the Notice of Appeal in this case within 42 days of the district court's order on his Rule 35 motion relates back to, and is timely from, the original judgment of conviction. (R., pp.158, 163.)

accident. See 2012 Opinion No. 56S, pp.2-3 (Ct. App. December 19, 2012) (*hereinafter*, Opinion). Regarding the narrow issue of whether the district court erred in permitting the alleged victim's father to present evidence in the form of a victim impact statement, the Court of Appeals held that this was error in light of the plain language of I.C. § 19-5306. (Opinion, pp.3-8.) However, the court ultimately deemed this error to be harmless. (Opinion, pp.5-8.) Finally, the Court of Appeals found that the district court did not abuse its discretion at sentencing. (Opinion, pp.8-9.) Accordingly, the Court of Appeals affirmed Mr. Hansen's judgment of conviction and sentences for aggravated driving under the influence and leaving the scene of an injury accident. (Opinion, p.9.)

The State thereafter petitioned this Court for review on the issue of whether, "a sentencing court may not accept evidence of how the crime affected the victim from any witness except the victim him or herself." (Respondent's Brief in Support of Petition for Review, p.3.) This Court granted review over "the issues presented in this appeal." (Order Granting Respondent's Petition for Review.)

ISSUES

1. Is Mr. Hansen's appeal of his underlying sentences permitted under the terms of the appellate waiver contained within his plea agreement?
2. Did the district court err when it permitted the father of the adult victim of one of Mr. Hansen's underlying offenses to provide a victim impact statement at sentencing over Mr. Hansen's objection?
3. Did the district court impose excessive sentences for Mr. Hansen's underlying criminal convictions, and thereby abuse the court's discretion?

ARGUMENT

I.

Mr. Hansen's Appeal Of His Underlying Sentences Is Permitted Under The Terms Of The Appellate Waiver Contained Within His Plea Agreement

A. Introduction

As a threshold matter, Mr. Hansen asserts that the appellate waiver contained within his plea agreement does not prohibit his appeal from either of his sentences in this case. Mr. Hansen's plea agreement with regard to the offenses at issue in this appeal provided that his right to appeal from his sentences would be re-instated if the district court exceeded the State's recommendations as to the determinate portion of his sentences. Because the district court exceeded the sentencing recommendation as to Mr. Hansen's sentence for leaving the scene of an injury accident, he may appeal from his underlying sentences under the terms of the plea agreement in this case. Moreover, to the extent that there may be an ambiguity as to whether he may appeal from his underlying sentences, Mr. Hansen asserts that the ambiguity must be construed in his favor and against the State.

B. Mr. Hansen's Appeal Of His Underlying Sentences Is Permitted Under The Terms Of The Appellate Waiver Contained Within His Plea Agreement

Mr. Hansen asserts that, because the district court exceeded the State's sentencing recommendation as to the determinate term of his sentence for leaving the scene of an injury accident, he is permitted to appeal his underlying sentences under the terms of his plea agreement.

Plea agreements, being contractual in nature, are generally interpreted by this Court in accordance with contract law principles. See, e.g., *State v. Allen*, 143 Idaho

267, 270 (Ct. App. 2006). This includes review for whether the terms of the contract are ambiguous. When the language in a plea agreement is ambiguous, this Court will hold any ambiguity against the State and in favor of the defendant. *State v. Peterson*, 148 Idaho 593, 595 (2010). As held by this Court in *Peterson*:

Ambiguities in a plea agreement are to be interpreted in favor of the defendant. “As with other contracts, provisions of plea agreements are occasionally ambiguous; the government ‘ordinarily must bear responsibility for any lack of clarity.’” “[A]mbiguities are construed in favor of the defendant. Focusing on the *defendant’s* reasonable understanding also reflects the proper constitutional focus on what induced the *defendant* to plead guilty.”

Id. at 596 (internal citations omitted) (emphasis in the original). “When interpreting a term of a contract, this Court is obligated to view the entire agreement as a whole to discern the parties’ intentions.” *Henderson v. Henderson Investment Properties*, 148 Idaho 638, 640 (2010).

In this case, Mr. Hansen asserts that his plea agreement permits his current appeal from his underlying sentences. In the written amended plea agreement form in this case, the following provision addressed Mr. Hansen’s appellate rights:

By accepting this offer the defendant waives the right to: (1) file a Rule 35 Motion (except as to illegal sentence) and (2) appeal any issues in this case, including all matters involving the plea or the sentencing and any rulings made by the court, including all suppression issues. **However, the defendant may appeal the sentence if the Court exceeds the determinate portion of the State’s sentencing recommendation of the “Jail/Prison terms” set forth above.**

R., p.111 (emphasis added).

The State’s sentencing recommendations were as follows under this agreement: three years fixed and 12 years indeterminate for Mr. Hansen’s plea to aggravated

driving under the influence, and zero years fixed with five indeterminate for his plea to leaving the scene of an injury accident. (R., p.111.)

The district court exceeded the State's recommendation as to the determinate portion of Mr. Hansen's sentence for leaving the scene of an injury accident when the court imposed a sentence of three years fixed, with two years indeterminate, for this offense. (Tr., p.66, Ls.11-13; R., pp.111, 145.) Given that the fixed term of incarceration for Mr. Hansen's sentence of leaving the scene of an injury accident exceeds the recommendation made by the State, this triggered the reservation of Mr. Hansen's right to appeal that was contained within the plea agreement. In light of this, Mr. Hansen's right to appeal from his sentences was reserved under the terms of his plea agreement, and his challenges to the district court's sentencing determinations are properly before this Court.

Additionally, to the extent that there is any ambiguity with regard to whether the appellate waiver in his case would remain in effect for his sentence for aggravated driving under the influence, Mr. Hansen asserts that this ambiguity must be construed against the State and in favor of his retention of the right to appeal from both of his sentences. See *Peterson*, 148 Idaho at 595-596. The Court of Appeals in this case determined that, because the appellate waiver only provided for reinstatement of Mr. Hansen's appellate rights for "the sentence" if the trial court exceeded the State's sentencing recommendation, this unequivocally limited the right to appeal to the sentence for each individual charge brought within the same criminal case. (Opinion, pp.2-3.) Mr. Hansen respectfully disagrees.

Mr. Hansen's plea agreement, and the waiver contained therein, treated both charges as part and parcel of one criminal case. It is at the very least unclear whether the district court's failure to abide by the State's sentencing recommendation would render the entire appellate waiver a nullity, given that the waiver was part of a package plea agreement for both offenses. In light of this ambiguity, Mr. Hansen asserts that the ambiguity should be construed in favor of full reinstatement of his appellate rights for both his sentence for aggravated driving under the influence and for leaving the scene of an injury accident.

II.

The District Court Erred When It Permitted The Father Of The Adult Victim Of One Of Mr. Hansen's Underlying Offenses To Provide A Victim Impact Statement At Sentencing Over Mr. Hansen's Objection

A. Introduction

The district court in this case erroneously permitted the victim's father to provide a victim impact statement in this case, over Mr. Hansen's objection. This was error because the victim's father did not fall within the definition of a victim under I.C. § 19-5306, and did not otherwise qualify under the two situations identified by this statute under which an immediate family member of a crime victim may provide a victim impact statement. Despite the State's assertions to the contrary, I.C. § 19-5306 does provide the legal standards for who qualifies as a "victim" in all non-capital cases for purposes of victim impact statements at sentencing – and there is good reason for such. Because the district court is **required** under almost all circumstances to consider victim impact evidence, and therefore lacks the discretion normally accorded to the court as to

whether to consider the evidence presented at sentencing, the Idaho Legislature has also provided the framework under which the court must determine what is or is not victim impact evidence. The alleged victim's father in this case does not fall within the statutory definition of a victim for purposes of providing a victim impact statement. As such, the district court's admission of this statement as a victim impact statement at sentencing was erroneous.

B. Standard Of Review

This Court reviews a district court's decision as to whether to permit a victim impact statement at sentencing for an abuse of discretion. *See State v. Lampien*, 148 Idaho 367, 373 (2009). This Court applies a three-part test with regard to the question of whether the district court abused its discretion. First, this Court examines whether the district court correctly perceived the issue as one of discretion. *State v. Perry*, 139 Idaho 520, 521 (2003). Second, this Court reviews whether the district court acted within the proper bounds of its discretion and consistently with the legal standards that are attendant on its determination. *Id.* Finally, this Court must determine whether the district court reached its discretionary determination through an exercise of reason.

Issues regarding the proper interpretation of a statute are questions of law that this Court reviews *de novo*. *Lampien*, 148 Idaho at 373-374. The proper interpretation of a statute begins with the literal language of the statute, and, in interpreting a statute, this Court must give effect to every word contained therein. *Id.* In addition, this Court will not revise the plain wording of a statute, even to avoid absurd results, where the language of the statute is unambiguous. *See Verska v. St. Alphonsus Regional Medical Center*, 151 Idaho 889, 896 (2011).

Where the defendant objects to the error at issue on appeal, the State bears the burden of establishing that the error was harmless beyond a reasonable doubt. *State v. Perry*, 150 Idaho 209, 228 (2010); *see also State v. Longest*, 149 Idaho 782, 784-786 (2010) (applying the standards of review for objected to and non-objected to error in the context of sentencing proceedings).

C. The District Court Erred When It Permitted The Father Of The Adult Victim Of One Of Mr. Hansen's Underlying Offenses To Provide A Victim Impact Statement At Sentencing Over Mr. Hansen's Objection

Mr. Hansen asserts that the district court erred when it permitted the father of an adult victim of one of his offenses to provide a victim impact statement at sentencing, over Mr. Hansen's objection. (Tr., p.36, Ls.5-22.)

As an initial matter, it is important to clarify what is – and what is not – at issue with regard to Mr. Hansen's claim on appeal with regard to the admission of the alleged victim's father's statement specifically as a victim impact statement. The State, in its petition for review to this Court, has framed the Court of Appeals' holding as standing for the proposition that the trial court may never hear any evidence regarding the nature of the offense or the impact of the crime on that person from any individual other than the crime victim as defined by I.C. § 19-5306. (Respondent's Brief, pp.3-9.) Mr. Hansen respectfully submits that this overstates the actual holding in this case.

Rather than challenging the admissibility of any statements from the alleged victim's father in **any** capacity, Mr. Hansen's challenge is actually far narrower. It is that this statement should not have been admitted as a victim impact statement for purposes of sentencing. The Court of Appeals' holding in this case was rendered in the context of this specific challenge, and does not extend beyond statements that are not admitted

specifically as victim impact statements pursuant to I.C. § 19-5306 and Article I, Section 22 of the Idaho State Constitution. (Opinion, pp.3-8.) All of the case law relied upon by the Court of Appeals in this case, along with its statutory analysis, is limited to statements that are admitted specifically as victim impact evidence, and the holding does not extend outside of these legal parameters. (Opinion, pp.3-8.)

The distinction between victim impact evidence and other types of evidence at sentencing matters. There is a significant difference between the manner in which the district courts are required to treat and consider victim impact evidence, as opposed to all other types of evidence submitted to the trial court at sentencing.

Generally, the district court has very broad discretion in determining what evidence is to be admitted at sentencing. See, e.g., *State v. Burdett*, 134 Idaho 271, 275 (Ct. App. 2000); *State v. Viehweg*, 127 Idaho 87, 92 (Ct. App. 1995). In addition, the trial court must disregard hearsay information at sentencing if there is no reasonable basis to deem it reliable, such as where the information is based upon conjecture. *Burdett*, 134 Idaho at 275. However, the district court's consideration of victim impact statements at sentencing is rendered mandatory under the operation of Article I, § 22 of the Idaho State Constitution and I.C. § 19-5306. See, e.g., *State v. Lovelace*, 140 Idaho 73, 80 (2004).

Both the statute and the constitutional provision provide that crime victims, as defined by statute, shall be heard at sentencing – making the admission of and consideration of victim impact statements at sentencing mandatory upon the trial court. See, e.g., *State v. Matteson*, 123 Idaho 622, 625 (1993); *State v. Leon*, 142 Idaho 705, 707-708 (Ct. App. 2006). In fact, “[s]o long as manifest injustice is avoided, the

sentencing court has no discretion to exclude a victim impact statement.” *State v. Grant*, ___ Idaho ___, ___ P.3d ___, 2013 WL 646280, *6 (2013)⁴; *State v. Deisz*, 145 Idaho 826, 832 (2008); *Leon*, 142 Idaho at 708. In addition to admission of such statements being mandatory, this Court has very recently held that many of the restrictions on the content of such statements that are present in the context of capital cases have no application in cases where the death penalty is not being sought. *Grant*, 2013 WL 646280 at *5-6. That being the case, admission of the victim’s father’s statement as a victim impact statement, as opposed to other types of evidence at sentencing, makes a significant difference at sentencing. Unlike all other types of evidence at sentencing that may be limited or disregarded as a matter of the court’s discretion, admission and consideration of a victim impact statement by the trial court at sentencing is required.

In addition, the State’s suggestion that I.C. § 19-5306 does not limit who may present victim impact statements is not supported by the pertinent case law. By its terms, this statute applies to every criminal offense – not merely to capital offenses. See I.C. § 19-5306. In promulgating this statute, the legislature has limited those who qualify as “victims” in non-homicide cases as only those who suffer direct harm as a result of the commission of an offense. I.C. § 19-5306(5)(a). This Court has already held that the language employed within this statute limits the scope of who qualifies as a victim for purposes of presenting a victim impact statement. This Court held:

In this instance, we hold that I.C. § 19-5306 limits victim impacts statements to immediate family members. **First, reading the entire statute makes it clear that the legislature intended to limit the**

⁴ The Opinion in *Grant* is not yet final as of the writing of this Appellant’s Brief on Review, and may be subject to further revision or withdrawal.

definition of “victim” by providing that a victim must have suffered direct harm as a result of the commission of the crime. I.C. § 19-5306(5)(a). Additionally, in cases of homicide, it extends the right to make a statement only to immediate family members.

State v. Payne, 146 Idaho 548, 575 (2008) (emphasis added)

Thus, contrary to the State’s suggestion, this Court has already found that the definition provided for the term “victim” within I.C. § 19-5306 operates as a limitation on which persons are empowered to present a victim impact statement for purposes of sentencing. Turning then to Mr. Hansen’s actual claim of error on appeal, he submits that the district court erred in permitting the alleged victim’s father to present evidence in the form of a victim impact statement at sentencing.

Article I, § 22 of the Idaho State Constitution sets forth the rights of crime victims, and among these rights is the right to, “be heard, upon request, at all criminal justice proceedings considering a plea of guilty, sentencing, incarceration or release of the defendant, unless manifest injustice would result.” IDAHO CONST. Art. I, § 22. However, this same provision of our Constitution likewise commits to the discretion of the legislature the power to, “enact laws to **define**, implement, preserve, and expand the rights guaranteed to victims in the provisions of this section.” *Id.* (emphasis added). As such, it is by statute in Idaho that the scope of who qualifies as a “victim” is defined.

In that capacity, the Idaho legislature has set forth provisions defining the rights of crime victims, as well as defining who qualifies as a crime victim, under I.C. § 19-5306. By statute, the right of the immediate family members of crime victims to present victim impact statements at sentencing is limited to two circumstances: (1) where the victim at issue was the victim of a homicide offense; and (2) where the victim is “of such youthful age or incapacity as precludes them from exercising these rights personally.”

I.C. § 19-5306(4). Otherwise, the right to be heard at sentencing pursuant to this statute is limited to those who were directly harmed as a result of the underlying criminal conduct. I.C. § 19-5306(5)(a).

As an initial matter, neither of the two scenarios provided for by statute for permitting the immediate family members to provide a victim impact statement are met in this case. First, this was not a homicide offense. Additionally, the alleged victim was not, “of such youthful age or incapacity” to preclude him from providing a victim impact statement. The victim in this case appears to be a legal adult, given his having graduated from high school in 2009 and having been a member of the United States Marine Corps prior to Mr. Hansen’s charged offenses. (Tr., p.34, L.10 – p.35, L.18.) Additionally, the victim was demonstrably capable of personally exercising his rights to present a victim impact statement; and, in fact, did so at Mr. Hansen’s sentencing. (Tr., p.34, L.10 – p.36, L.3.) In light of the fact that neither provision for the presentation of a victim impact statement by a member of the victim’s immediate family applies in this case, the district court erred when it permitted the victim’s father to present a victim impact statement in this case.

Additionally, the victim’s father did not qualify as a “victim” of Mr. Hansen’s charged offenses under the definition of that term by statute. As used for purposes of I.C. § 19-5306, a “victim” is “an individual who suffers **direct** and threatened physical, financial, or emotional harm **as the result of** the commission of a crime.” I.C. § 19-5306(5)(a) (emphasis added). In determining who qualifies as one directly harmed as a result of the defendant’s criminal conduct, this Court looks to principles of causation arising from tort law for guidance. *Lampien*, 148 Idaho at 374. Under pertinent

principles under tort law, the emotional harms identified by the adult victim's father in this case would not establish the requisite direct harm to qualify as a victim for purposes of I.C. § 19-5306.

Idaho case law indicates that a tort action for damages may not be had for the parents of an injured child for the "mental distress and worry suffered by the parents by reason of the injuries inflicted upon their child." See *Hayward v. Yost*, 72 Idaho 415, 426-427 (1952). Additionally, appellate counsel has been unable to locate *any* cases in Idaho recognizing the right of a parent to recovery for purely emotional damages as a result of a child's injuries due to conduct that the parent did not witness and that occurred when the parent was not also present.⁵

While the victim's father was – quite understandably – very distressed and angered by his son's injuries and subsequent struggles, this is not the type of direct injury contemplated by I.C. § 19-5306 for purposes of establishing that a person qualifies as a "victim" for purposes of this statute. Accordingly, the district court erred

⁵ There may be an exception to this rule for where negligent infliction of emotional distress is coupled with physical injury or manifestations of that distress. See *Czaplicki v. Gooding School Dist. No. 231*, 116 Idaho 326, 332 (1989). In addition, recovery for intentional infliction of emotional distress is limited only to those cases where the resulting emotional distress is "so severe that no reasonable [person] could be expected to endure it." See *Payne v. Wallace*, 136 Idaho 303, 306 (2001) (quoting *Davis v. Gage*, 106 Idaho 735 (Ct. App. 1984)) (alteration in original). Proof of subsequent periodic bouts of fear or anger, coupled with a continuing aversion to the intersection where a traffic collision occurred, was deemed by the court in *Payne* to be insufficient to permit a claim for recovery based upon to emotional distress. *Id.* at 306-307. There is an additional exception in Idaho permitting recovery of emotional damages by a surviving spouse or next-of-kin, without requirement of any underlying physical manifestation of those damages, due to the mishandling of a decedent's physical remains. See *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 837 (1990). These appear to be the only circumstances which, under tort law, permit the imposition of liability for purely emotional damages based upon conduct directed at another.

when the court permitted the adult victim's father to present a victim impact statement at sentencing.

Additionally, the State cannot establish that this error was harmless beyond a reasonable doubt. While this Court generally presumes that sentencing judges are capable of sorting out only that evidence which is admissible and appropriate with regard to victim impact evidence, this presumption is not irrefutable. See, e.g., *Payne*, 146 Idaho at 574-575. In fact, the *Payne* Court determined that it could not declare a belief, beyond a reasonable doubt, that the district court's error in permitting improper victim impact evidence to be introduced was harmless. *Id.* Of note to the Court's decision in *Payne* were two factors – the inflammatory nature of the victim impact evidence received; and the district court's ruling allowing the evidence to be presented, therefore indicating that the court was not aware that the evidence was not properly before the court. *Id.*

These same factors are present in this case. The district court in this case “noted” Mr. Hansen's objection that the father's testimony was not properly before the court because the father was not the victim in this case. (Tr., p.36, Ls.5-22.) However, the district court thereafter ruled that it would allow the victim's father, “to address the court in that capacity.” (Tr., p.36, Ls.21-22.) This indicates the district court's belief that the victim's father's statement was properly before the court as a victim impact statement pursuant to I.C. § 19-5306.

Additionally, the content of the victim's father's statement was highly inflammatory. At several points during his statement, the victim's father focused his remarks on personal characterizations of Mr. Hansen and his character. He referred to

Mr. Hansen as a, “cruel, selfish coward.” (Tr., p.39, Ls.2-4.) The victim's father thereafter asserted that Mr. Hansen had been out “celebrating his crimes by using drugs and accumulating more charges.” (Tr., p.44, Ls.8-10.) Additionally, the victim's father characterized Mr. Hansen as having an “anti-social personality disorder,” and further characterized him as “dangerous and unfixable.” (Tr., p.44, Ls.16-22.) He stated that Mr. Hansen had “no likelihood of rehabilitation; characterized Mr. Hansen's life as one “entirely committed to criminal behavior” rather than contributing anything to society; and asked the court to apply the “maximum sentence” to each conviction to “be served consecutively.” (Tr., p.45, L.1 – p.46, L.7.) In view of these repeated inflammatory remarks, it cannot be said beyond a reasonable doubt that the victim impact statement presented by the victim's father in this case did not impact on the sentencing determination of the court in this case.

The district court's admission of a victim impact statement from the adult victim's father was error, and this error was not harmless. Accordingly, Mr. Hansen asks that this Court reverse his judgment of conviction and sentence, and remand his case for further proceedings.

III.

The District Court Imposed Excessive Sentences In Mr. Hansen's Case, And Thereby Abused Its Discretion

Mr. Hansen asserts that, in light of the pertinent sentencing criteria and the facts of his case, the district court imposed excessive sentences, and thereby abused its discretion. Specifically, Mr. Hansen asserts that the district court's sentences of 15 years, with three years fixed, upon his guilty plea to aggravated driving under the

influence and five years, with three years fixed, upon his guilty plea to leaving the scene of an injury accident were excessive, and therefore constituted an abuse of the court's discretion.

Where a defendant contends that the sentencing court imposed an excessively harsh sentence the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence." *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Hansen does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Hansen must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria, or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* This Court reviews both the fixed and the indeterminate portion of a sentence upon a claim that the defendant's sentence was excessive. *State v. Oliver*, 144 Idaho 722, 726 (2007).

In addition to abusing its discretion in improperly admitting a victim impact statement from an individual who did not qualify as a statutory victim in this case, Mr. Hansen asserts that the district court abused its discretion in failing to give adequate consideration to the mitigating evidence presented to the court at sentencing. In doing

so, Mr. Hansen asserts that the district court failed to act in accordance with its statutory duty to impose an individualized sentence that reflects adequate consideration of the relevant characteristics of the defendant. *See, e.g., State v. Johnson*, 101 Idaho 581, 584 (1980); *State v. Howry*, 127 Idaho 94, 95 (Ct. App. 1995).

From the outset, one of the most important indicators that Mr. Hansen has strong rehabilitative potential is his willingness to accept responsibility for the actions giving rise to his criminal convictions. Mr. Hansen, at his sentencing, made numerous and heartfelt apologies for the harm he caused as a result of his drunk driving. (Tr., p.60, L.19 – p.61, L.9.) He further recognized that, in order to change in the future, he would have to commit to seeking out help from therapeutic resources. (Tr., p.61, Ls.10-11.) As significant, Mr. Hansen also acknowledged that he needed to be accountable for his past actions. (Tr., p.60, Ls.11-13.) In each of these instances, Mr. Hansen demonstrated key insight into his past criminal behavior and the harm that his actions caused. And these insights led Mr. Hansen to commit to changing his behavior in the future. (Tr., p.61, Ls.13-20.)

In addition, at his sentencing hearing, the district court heard evidence that Mr. Hansen had been actively pursuing his rehabilitation through participation in religious programs while incarcerated. (Tr., p.48, L.19 – p.49, L.22.) Mr. Hansen also presented testimony from Tony Lopez, who is an individual from an organization known as the Victory Home. (Tr., p.50, Ls.5-12.) The Victory Home is a faith-based group that works with individuals with substance abuse issues, behavioral problems, and further attempts to reintegrate individuals with criminal histories back into their communities as positive, contributing members. (Tr., p.50, L.7 – p.51, L.16.) According to Mr. Lopez,

Mr. Hansen and his family had made several contacts with this organization in an attempt to get Mr. Hansen additional assistance in working towards his rehabilitation. (Tr., p.50, Ls.7-12.) He further informed the district court that Mr. Hansen would be able to participate in the programming offered at the Victory Home for “no less than a year.” (Tr., p.51, Ls.14-16.) Mr. Hansen’s personal initiative in seeking out the assistance of a community of faith and therapeutic programming resources in order to further his rehabilitation is an important indicator that he is committed to breaking his past pattern of criminal thinking and behaviors.

Mr. Hansen’s struggles with alcohol, and his criminal behavior that resulted therefrom, stemmed from his childhood years fraught with instability and surrounded by substance abuse. His father left his mother before Mr. Hansen was born. (Presentence Investigation Report (*hereinafter*, PSI), p.31.) The two of them met while in a residential drug treatment program where they were both attempting to overcome their addiction to methamphetamine. (PSI, p.31.) Although his parents remained in a very unstable relationship together for several years before Mr. Hansen was born, his mother eventually left his father while pregnant with Mr. Hansen. (PSI, p.31.) Mr. Hansen’s father was jailed shortly thereafter for stalking and was incarcerated when Mr. Hansen was born. (PSI, p.31.)

His mother relapsed into methamphetamine abuse when Mr. Hansen was very young. (PSI, p.31.) He remembers one occasion, when he was about five years old, that a SWAT team burst into his house. (PSI, p.31.) Additionally, one of his mother’s friends abused Mr. Hansen as a small child, but plied him with controlled substances as a means of keeping Mr. Hansen silent and compliant about the abuse. (PSI, p.64.)

This same man introduced Mr. Hansen to methamphetamine when he was only 13 years old. (PSI, p.65.) It is no coincidence that, at this point in Mr. Hansen's life, his struggles with schoolwork and behavioral problems began to emerge. (PSI, pp.41, 64.)

Mr. Hansen did have a brief period of time living with his father when he was 12 years old, but this reunion was short lived. (PSI, p.31.) During this time, Mr. Hansen was beaten violently by his father. (PSI, p.32.) While Mr. Hansen's father was out driving truck, his father's girlfriend kicked Mr. Hansen – then a 12 year old child – out of his father's home. (PSI, p.31.) His mother had to fly Mr. Hansen back to Idaho in order to prevent him from becoming a ward of the Ohio Child Protective System. (PSI, p.31.)

Given the instability, along with the physical and emotional harms, that were visited upon Mr. Hansen in his most formative years, it is unsurprising that he turned to alcohol and illicit substances as a means of coping. Mr. Hansen first began using alcohol when he was only nine years old. (PSI, p.51.) His use of controlled substances extended into nearly every type of illegal drug available. (PSI, pp.51-53.)

The extremity of Mr. Hansen's struggles in his formative childhood years, as well as his long-term struggles with substance abuse and addiction, was also noted by the prosecutor in this case. The prosecutor specifically took note of the fact that Mr. Hansen's substance abuse reached back to when he was only nine years old. (Tr., p.53, Ls.9-17.) In addition, the mental health evaluator in this case specifically concluded that there was a direct causal relationship between Mr. Hansen's childhood abuse, his subsequent issues with addiction, and his underlying criminal charges. (PSI, p.66.) The evaluator determined that the inception of Mr. Hansen's struggles with

alcohol and drugs flowed from his attempt to self-medicate – to “numb the abuse” in the evaluator’s words. (PSI, p.66.)

In addition to the materials at sentencing which demonstrated Mr. Hansen’s troubled childhood, and the manner in which these traumas contributed to his underlying offenses, Mr. Hansen further presented the district court with numerous letters of support. Among these was a letter from Jose Orozco, who was Mr. Hansen’s juvenile probation officer. (PSI, p.75.) Mr. Orozco’s relationship with Mr. Hansen did not end when Mr. Hansen was off probation – Mr. Orozco maintained contact with Mr. Hansen even after he was released from probation. (PSI, p.75.) Being familiar both with Mr. Hansen’s struggles and his efforts to change, Mr. Orozco informed the district court that Mr. Hansen has the potential to be successful and to overcome his emotional struggles with the help of others. (PSI, p.75.) Based upon Mr. Hansen’s sincere desire to make positive changes in his life, Mr. Orozco asked the district court to allow Mr. Hansen to seek treatment outside of the confines of incarceration.

Mr. Hansen also presented the district court with additional materials from the Victory House. (PSI, pp.76-78.) In addition to the information that was given to the court at sentencing, these materials also showed the specific emphases of the therapeutic programming, and the schedules of that programming, that were offered by the Victory House. (PSI, pp.77-78.) Finally, Mr. Hansen provided the court with letters of support from his wife and family members. (PSI, pp.79-81.) These letters showed, not only that Mr. Hansen has the potential to be a positive figure in the lives of those closest to him, but also that he has a robust community of support within his family to assist Mr. Hansen in his efforts at rehabilitation in the future.

In light of the evidence in this case, the district court's sentences were excessive and therefore constituted an abuse of discretion. Accordingly, Mr. Hansen asks that this Court reduce his sentences as it deems appropriate.

CONCLUSION

Mr. Hansen respectfully requests that this Court reverse his judgments of conviction and sentences, and remand this case for further proceedings. In the alternative, he asks that this Court reduce his sentences as it deems appropriate.

DATED this 19th day of March, 2013.

A handwritten signature in cursive script, appearing to read "S. Tompkins", written over a horizontal line.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

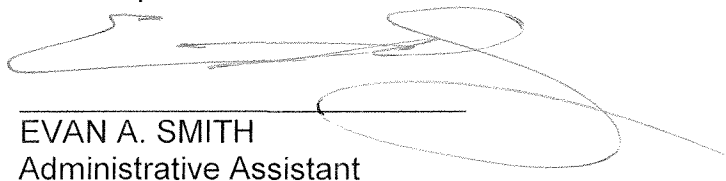
I HEREBY CERTIFY that on this 19th day of March, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF ON REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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